State of Wisconsin
2003 – 2004 LEGISLATURE

LRB-4517/P2
PJK:wlj:jf

PRELIMINARY DRAFT – NOT READY FOR INTRODUCTION

Date soon (in 4-27)

AN ACT *to amend* subchapter III (title) of chapter 632 [precedes 632.22]; and *to create* 632.28 of the statutes; **relating to:** environmental claims under general liability insurance policies and granting rule-making authority.

Regen

Analysis by the Legislative Reference Bureau

This is a preliminary draft. An analysis will be provided in a later version.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

SECTION 1. Subchapter III (title) of chapter 632 [precedes 632.22] of the statutes is amended to read:

CHAPTER 632

SUBCHAPTER III

~~LIABILITY~~ GENERAL LIABILITY INSURANCE ~~IN GENERAL~~

SECTION 2. 632.28 of the statutes is created to read:

632.28 Environmental claims under liability insurance policies. (1) DEFINITION. In this section, "environmental claim" means a claim for defense or

indemnity that is submitted under a general liability insurance policy by an insured and that is based on the insured's liability or potential liability for bodily injury or property damage arising from a release of pollutants onto land, or into air or water, in the state.

(2) RULES OF CONSTRUCTION OF POLICY UNDER WHICH CLAIM IS MADE. For interpreting a general liability insurance policy under which an environmental claim is made in any action between the insured and the insurer to determine the existence of coverage under the policy for the costs of investigating and remediating environmental contamination, whether in response to governmental demand or under a voluntary written agreement, consent decree, or consent order, including the existence of coverage for the costs of defending a suit against the insured for investigation and remediation costs, the following rules apply:

(a) State law shall be applied in all cases involving environmental claims. Nothing in this section shall be interpreted to modify common law rules governing choice of law determinations for sites located outside this state.

(b) Any action taken by the department of natural resources or the federal environmental protection agency against or with an insured in which the department of natural resources or the federal environmental protection agency, in writing, notifies the insured that it considers the insured to be a potentially responsible party, or directs, requests, or agrees that the insured take action with respect to contamination within this state, is equivalent to a suit or lawsuit as those terms are used in the general liability insurance policy.

(c) The insurer may not deny coverage for any reasonable and necessary fees, costs, and expenses, including costs and expenses of remedial investigations and feasibility studies, that are incurred by the insured under a voluntary written

agreement, consent decree, or consent order between the insured and the department of natural resources or the federal environmental protection agency and as a result of a written direction, request, or agreement by the department of natural resources or the federal environmental protection agency to take action with respect to contamination within the state, on the ground that those expenses constitute voluntary payments by the insured.

(3) INSURER'S PAYMENT DUTY; INSURED'S NOTICE DUTY. (a) An insurer with a duty to pay defense or indemnity costs, or both, to an insured for an environmental claim under a general liability insurance policy that provides that the insurer has a duty to pay all sums arising out of a risk covered by the policy must pay all defense or indemnity costs, or both, proximately arising out of the risk in accordance with the applicable terms of its policy, including its limit of liability, independent of and unaffected by any other insurance that may provide coverage for the same claim.

(b) 1. If an insured who makes an environmental claim under a general liability insurance policy that provides that the insurer has a duty to pay all sums arising out of a risk covered by the policy has more than one such general liability insurance policy insurer, the insured shall provide notice of the claim to every such insurer for whom the insured has a current address.

2. If the insured's claim is not fully satisfied under par. (a), the insured may elect to file suit on the remainder of the claim against only one insurer under subd. 1., notwithstanding ss. 803.03 and 806.04 (11).

3. If requested by an insurer against which the insured files suit under subd. 2., the insured shall provide information regarding other general liability insurance policies held by the insured that would potentially provide coverage for the same environmental claim.

4. An insurer against which the insured files suit under subd. 2. may not be required to pay defense or indemnity costs in excess of the applicable policy limits, if any, on such defense or indemnity costs.

(4) COSTS TO BE AWARDED TO INSURED. The court shall award to an insured the sum of the costs, disbursements, and expenses, including accounting fees and reasonable attorney fees, necessary to prepare for and participate in an action in which the insured successfully litigates a coverage issue for an environmental claim.

(5) CONTRIBUTION AMONG INSURERS. An insurer that pays an environmental claim may seek contribution from any other insurer that is liable or potentially liable for the claim, subject to s. 631.43.

(6) PRESUMPTIONS. (a) There is a rebuttable presumption that the costs of preliminary assessments, remedial investigations, risk assessments, or other necessary investigation, as those terms are defined by rule ~~by the department of natural resources~~, are defense costs payable by the insurer, subject to the provisions of the general liability insurance policy under which there is coverage for the costs.

(b) There is a rebuttable presumption that the costs of removal actions or feasibility studies, as those terms are defined by rule ~~by the department of natural resources~~, are indemnity costs and that payment of those costs by the insurer reduces the insurer's applicable limit of liability on the insurer's indemnity obligations, subject to the provisions of the general liability insurance policy under which there is coverage for the costs.

(7) LOST POLICY. (a) In this subsection, "lost policy" means all or any part of a general liability insurance policy that is subject to an environmental claim and that is ruined, destroyed, misplaced, or otherwise no longer possessed by the insured.

(b) If, after a diligent investigation by an insured of the insured's own records, including computer records and the records of past and present agents of the insured, the insured is unable to reconstruct a lost policy, the insured may provide notice of the lost policy to the insurer that the insured believes issued the policy. The notice must be in writing and in sufficient detail to identify the person or entity claiming coverage, including the name of the alleged policyholder, if known, and any other material facts concerning the lost policy known to the person providing the notice.

(c) An insurer must thoroughly and promptly investigate a notice of a lost policy and must provide to the insured claiming coverage under the lost policy all facts known or discovered during the investigation concerning the issuance and terms of the policy, including copies of documents establishing the issuance and terms of the policy.

(d) For facilitating reconstruction, and determining the terms, of a lost policy, the insurer and the insured must comply with the following minimum standards:

1. Within 30 business days after receipt by the insurer of notice of a lost policy, the insurer shall commence an investigation into the insurer's records, including computer records, to determine whether the insurer issued the lost policy. If the insurer determines that it issued the policy, the insurer shall commence an investigation into the terms and conditions relevant to any environmental claim made under the policy.

2. The insurer and the insured shall cooperate with each other in determining the terms of a lost policy. The insurer and the insured shall provide to each other the facts known or discovered during an investigation, including the identity of any witnesses with knowledge of facts related to the issuance or existence of the lost

policy, and shall provide each other with copies of any documents establishing facts related to the lost policy.

3. If the insurer or insured discovers information tending to show the existence of an insurance policy that applies to the claim, the insurer or insured shall provide an accurate copy of the terms of the policy or a reconstruction of the policy, upon the request of the insurer or the insured.

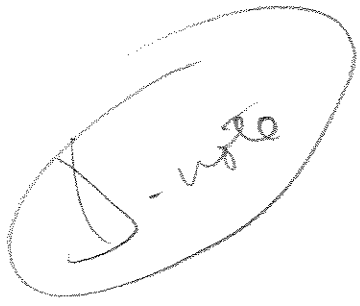
4. If the insurer is not able to locate portions of the policy or determine its terms, conditions, or exclusions, the insurer shall provide copies of all insurance policy forms issued by the insurer during the applicable policy period that potentially apply to the environmental claim. The insurer shall identify which of the potentially applicable forms, if any, is most likely to have been issued by the insurer to the insured, or the insurer shall state why it is unable to identify the forms after a good faith search.

(e) If, based on information discovered in the investigation of a lost policy, the insured can show by a preponderance of the evidence that a general liability insurance policy was issued to the insured by the insurer but cannot produce evidence that tends to show the policy limits applicable to the policy, it shall be assumed that the minimum limits of coverage, including any exclusions to coverage, that the insurer offered during the period in question under such policies apply to the policy purchased by the insured. If, however, the insured produces evidence that tends to show the policy limits applicable to the policy, the insurer has the burden of proof to show that a different policy limit, including any exclusions to coverage, apply to the policy purchased by the insured.

SECTION 3. Initial applicability.

(1) This act first applies to environmental claims made on the effective date of this subsection.

(END)



INSERT 4–21

(c) The department of natural resources shall promulgate a rule defining the terms specified in pars. (a) and (b) for purposes of the rebuttable presumptions under pars. (a) and (b).

(END OF INSERT 4–21)

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB–4517/P2dn
PJK:wlj:

This redraft makes a few changes in the terminology related to environmental remediation issues that were suggested by Becky Tradewell, who drafts in that area, and also requires the Department of Natural Resources to promulgate a rule under proposed s. 632.28 (6) (c). Do you want to place a time limit on the promulgation of the rule and delay the effective date of the bill until the rule is promulgated?

All other notes included with the P1 version of the draft still apply.

Pamela J. Kahler
Senior Legislative Attorney
Phone: (608) 266–2682
E–mail: pam.kahler@legis.state.wi.us

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB–4517/P2dn
PJK:wlj:rs

April 27, 2004

This redraft makes a few changes in the terminology related to environmental remediation issues that were suggested by Becky Tradewell, who drafts in that area, and also requires the Department of Natural Resources to promulgate a rule under proposed s. 632.28 (6) (c). Do you want to place a time limit on the promulgation of the rule and delay the effective date of the bill until the rule is promulgated?

All other notes included with the P1 version of the draft still apply.

Pamela J. Kahler
Senior Legislative Attorney
Phone: (608) 266–2682
E–mail: pam.kahler@legis.state.wi.us

4517

Kahler, Pam

From: Stuart, Todd
Sent: Tuesday, May 18, 2004 2:45 PM
To: Kahler, Pam
Cc: Kiel, Joyce; Hotynski, Rebecca
Subject: all sums insurance bill

Hi Pam:

I believe Matt in Rep Kaufert's office has sent you an identical drafting memo. If not, here are new instructions for a revised draft. Please call with questions.


All sums draft revisions 5-04....


all sums drafting questions & ...

Todd C. Stuart
Office of State Senator Rob Cowles
608.266.0484 Office
608.267.0304 Fax
todd.stuart@legis.state.wi.us

MEMORANDUM

TO: Pamela J. Kahler, Legislative Attorney

FROM: Senator Robert Cowles

DATE: May 17, 2004

RE: Preliminary Legislative Drafts 4514/P1 and P2

Thank you for your preliminary legislative drafts 4514/P1 and P2 regarding environmental liability insurance claims. I have reviewed the drafts and your questions and I have the following concerns and suggested revisions.

A. Responses to Drafter's Questions (LRB 4514/P1dn)

1. Applicability (Response to Drafter's Question 7 – proposed nonstatutory applicability section)

My intent is that this legislation apply to environmental claims arising from events before, on or after the effective date of this legislation, but not with respect to claims which have been settled or otherwise resolved before the passing of this legislation. I do not believe that the nonstatutory applicability language contained in the current preliminary draft accomplishes this goal.

As I explained in my drafting request memorandum, the problem addressed by this legislation arises where pollution damage occurred over a period of years and there are different insurers for various years. When an environmental claim is made, the multiple insurers cannot agree on how payment for the loss should be allocated among them. As a result, the policyholder does not get its claims paid until a court apportions the claim among the insurers.

Such claims often involve insurance policies from many years ago. In fact, the July 2003 decision of the Wisconsin Supreme Court in *Johnson Controls v. Employers Insurance of Wausau*, which I referenced in my memorandum, primarily opened up insurance coverage under pre-1986 policies which did not have an absolute pollution exclusion.

An example of an environmental problem arising over many years is pollution in the Fox River, which runs through part of my district. Pollutants from nearby industry entered the Fox River over a period of decades, beginning as early as the 1950's. During many of those years, the industries contributing to the pollution purchased general liability insurance policies that covered such environmental pollution. Because the pollution entered the river over many years, multiple insurers may have an obligation to cover the costs of the needed environmental remediation, but may not agree among themselves as to how to allocate those costs. This legislation is designed to promote fair treatment of insureds and to avoid unnecessary delay in resolution of such environmental claims.

The purpose of this legislation is to remedy a problem that was in existence prior to the Act's effective date and to provide a procedure or method for solving that problem. To achieve that remedial purpose, it is important that the legislation clearly apply to environmental claims even if the claims arise from events that occurred wholly or partially in the past. At the same time, I do not intend that the legislation would apply to environmental claims that have been fully resolved, either by settlement or final adjudication, before the effective date.

Accordingly, I request that you revise the applicability section of this legislation to state my explicit legislative intent that these provisions apply to any environmental claims that have not been *finally* adjudicated (in court or by arbitration) or settled, as of the effective date. Because I want my legislative intent to be clear in this regard, I would prefer a *statutory* applicability section.

2. DNR Rulemaking Directive

In preliminary draft section 632.28 (6) (c) you direct the DNR to promulgate rules to define the terms contained in sections 632.26 (6) (a) and (b). I believe it is unnecessary and inappropriate to delegate this task to the DNR.

The terms in § 632.28 (6) (c) are widely used and generally understood in environmental law. The terms "preliminary assessment" and "remedial investigation" are defined in the National Contingency Plan, 40 CFR § 300.5 and are regularly part of guidance documents, orders and other communications in matters involving the Comprehensive Environmental Response, Compensation and Liability Act, 42 USC § 9601, et seq. The term "risk assessment" is defined in Wis. Admin. Code § NR 700.03 (53). Two other terms not used in the initial draft, but that I would like included, are "site investigation" and "feasibility study." *See* Wis. Admin. Code § NR 716. These terms are part of the everyday language of environmental law.

To the extent that there may be an issue as to whether or how these terms apply to particular fact situations in an insurance coverage context, that determination is best left to the judiciary. Judges are well suited to make those kinds of decisions as long as the statute provides reasonable guidance. To best convey that guidance, I suggest that the section be modified to read: "There is a rebuttable presumption that the costs of necessary investigation, such as the costs of preliminary assessments, remedial investigations, risk assessments or site investigations, are defense costs payable by the insurer, subject to the provisions of the general liability insurance policy..." This should give the courts guidance while allowing flexibility in applying the presumption in varying factual situations.

3. Elimination of the Definition of "General Liability Insurance Policy" (Response to Drafter's Question #2)

I agree with your elimination of the definition of "general liability insurance policy."

4. Insurer's Payment Duty (Response to Drafter's Question 3 – proposed § 632.28 (3))

It is my intention that an insured suing for unpaid costs, may elect to sue only one insurer, or more than one insurer, *but* is not required to join all other insurers. But, I agree that this section needs additional clarification. Please see Item B.3 below for my suggested new language

5. Application of the Presumptions (Response to Drafter's Question 4 – proposed § 632.28 (6))

Yes. A rebuttable presumption is a concept that applies only in the context of lawsuits.

6. Exclusion of Coverage of Costs (Response to Drafter's Question 5 – proposed § 632.28 (6) (a))

It is unlikely that a general liability policy would specifically exclude any of the costs delineated in section 632.28 (6) (a), but, to clarify you may add that these are defense costs unless specifically excluded in the policy.

7. Information Showing Existence of Lost Policy (Response to Drafter's Question 6 – proposed § 632.28 (7) (d) 3.)

In order to make §§ 632.28 (7) (d) 3. more clear, please redraft as follows: "If the insurer or insured discovers information tending to show the existence of an insurance policy that applies to the claim, the *insurer* shall provide an accurate copy of the terms of the policy or a reconstruction of the policy, upon the request of the insured."

B. Suggested Revisions to the LRB-4517/P2 Draft

I have also attached a typed strikeout/underline draft of LRB-4517/P2, which illustrates all of my suggested revisions that are described below. In any section to which I added new language, I have indicated the page and line numbers in my explanation below, which corresponds to my attached revised (not your original) bill draft.

1. New Section – Define the Terms "Governmental entity" and Pollutant (Page 1, lines 16-17, and Page 2, lines 1-3)

Upon further reflection, I would like the draft to address any action taken by a "governmental entity" rather than just "the department of natural resources or the federal environmental protection agency" because this provides better flexibility.

In addition, I would like to add a definition of pollutant. This definition comes from Wisconsin case law.

Please include the following language in the P2 draft (Page 1, lines 16-17, and Page 2, lines 1-3):

"Governmental entity" means any federal, state or local government, or any instrumentality thereof, and any trustee for natural resources.

"Pollutant" means any solid, liquid, gaseous or thermal irritant or contaminant, including but not limited to smoke, vapor, soot, fumes, acids, alkalis, chemicals, asbestos, oil, gasoline, petroleum products, lead or lead based products and waste.

2. Revision – Substitution of the Term "Governmental entity"

Please substitute "governmental entity" for "the department of natural resources or the federal environmental protection agency" where indicated.

3. Revisions to "Rules of Construction" Section 632.28 (2)

Please amend the introductory language to the "Rules of Construction" section as indicated on page 2, line 4-11 of the attached draft.

In addition, please amend sections 632.28(2)(a), (b) and (c) as indicated to more clearly state my intention.

4. Revisions – Section 632.28 (3) (a)

Please delete the word "proximately" from section 632.28(3)(a) as indicated on page 3, line 16.

5. Revision/New Language – Clarification of the Insurer Selection Process in § 632.28(3)(b)1. (Page 4, lines 1-5)

I believe that we need a clearer mechanism by which an insured may choose an insurer to pay an environmental claim in § 632.28(3)(b)1.

Please include the following language in the P2 draft (page 4, lines 1-5):

The insured may designate a single policy period and the insurer or insurers for that policy period, including primary, umbrella and excess insurers, shall fully satisfy the environmental claim up to the policy limits. If the policy limits for all policies for that policy period are insufficient to fully satisfy the environmental claim, the insured may designate additional policy periods until the claim is fully satisfied.

6. Revision – Allow for Suit Against Multiple Insurers in § 632.28(3)(b)2.

It was my intention to allow, but not require, an insured to file suit against multiple insurers. Accordingly, please add "or against multiple insurers" on page 3, line 21, between the words "insurer" and "under subd." (Page 4, lines 7-8.)

In addition, please delete the reference to "under subd. 1" (page 4, line 7.)

7. New Section – Allow Direct Action by Department of Natural Resources Against Insurers (Page 4, lines 18-22, page 5, lines 1-3)

Upon further reflection, I would like to add an additional provision to this draft that would allow the government to directly sue an insurer of an insured that is potentially liable for bodily injury or property damage arising from the release of pollutants in the state.

Wisconsin already has direct action statutes (§§ 632.24 and 803.04) for negligence claims. To promote judicial economy and the efficient administration of justice with regard to environmental remediation, I would like to extend this concept to allow the government to directly sue liability insurers of those insureds who may have liability arising from a release of pollutants to land, air or water in this state. The existing direct action statutes have functioned successfully and efficiently in negligence cases and should similarly promote the efficient administration of justice in the environmental area.

Please include the following language in the P2 draft (Page 4, lines 18-22, page 5, lines 1-3):

> If the environmental claim is not fully satisfied under paragraph (3)(b), any insurer designated by the insured pursuant to paragraph (3)(b) that has not entered into a good faith settlement and release of the environmental claim is directly liable, up to the policy limits, to any governmental entity that seeks to recover against the insured for a release of pollutants onto or into land, air or water in the state, irrespective of whether the liability is presently established or is contingent and to become fixed or certain by final judgment. Such insurer may be joined in any action brought by a governmental entity against the insured.

8. Revision – Clarify the "Contribution Among Insurers" § 632.28(5) (Page 5, lines 4-10)

One of the purposes of this legislation is to promote early settlement of environmental insurance disputes, thereby facilitating the early resolution of underlying environmental claims and accompanying remediation of contaminated sites. However, this purpose would be undercut if an insurer could pursue a contribution action against another insurer with whom the insured had previously reach a good faith settlement in which it recovered less than all of its environmental claim. The legislation should not impair an insured's right to recover the full remaining balance of its actual loss from nonsettling insurers. According, I have drafted suggested clarifying language for this section.

Please include the following language in the P2 draft (page 5, lines 4-10):

> An insurer that has previously entered into a good faith settlement and release of an environmental claim, shall not be deemed liable or potentially liable for that claim, and a good faith settlement and release of an environmental claim with such insurer shall not reduce or otherwise impair the right of an insured to recover

the full balance of its actual loss from a nonsettling insurer, as provided in (3)(a) and (b)

9. Revision – Additional Terms to the "Presumption" Section § 632.28(6) and Deletion of Rulemaking Directive

I would like the terms "feasibility study, site investigations" added between the words "risk assessments," and "or other" (page 5, lines 12-13).

In addition, I would like the phrase "or feasibility studies" replaced with the words "remedial action or natural resource damages" (page 5, lines 17-18).

In addition, as discussed in Item A.2 above, all of these terms are commonly used in the field of environmental law and all are defined in various federal and state laws. Accordingly, please ***delete*** the references to DNR rulemaking contained in this section as indicated in the draft attached.

10. Revisions – Section 632.28(7)(d)3.

As noted in A.7. above, please delete the word "insured" from s. 632.28(7)(d)3. (page 7, line 9).

11. New Section – Please Add a Statutory Applicability Section and a Private Cause of Action

As discussed in detail in Item A.1. above, I would like a statutory applicability section added to this draft that will clearly indicate my intent.

In addition, I would like this legislation to allow individuals to be able to initiate a private cause of action if a person is injured as a result of violation of this bill, and I would like violations of this bill to constitute an unfair claim settlement practice as defined under current OCI rule.

Finally, I would like a severability clause included in this legislation that provides that if any provision of this statute is found to be invalid, such invalidity shall not affect the other provisions or applications of this law.

Please include the following language in the P2 (page 8-9):

(8) APPLICABILITY AND ENFORCEMENT. (a) This section applies to all environmental claims not finally resolved prior to the effective date of this section either by settlement or adjudication, whether arising before, on or after the effective date of this section.

(b) The commissioner shall enforce this section and any rules adopted by the office of the commissioner of insurance to implement this section.

(c) Violation by an insurer of any provision of this section or any rule adopted under this section is an unfair claim settlement practice under Wisconsin administrative code ch. INS 6.11 (3).

(d) Any person who is injured as a result of violation by an insurer of this section may bring an action against the insurer for costs, disbursements and expenses, including accounting fees and reasonable attorney fees incurred in connection with such violation, including the costs, disbursements and expenses incurred in bringing such action.

(e) The provisions of this section are severable. If any provision of this section is found to be invalid, or if any application of this section either to any person or circumstance is invalid, such invalidity shall not affect other provisions or applications which can be given effect without the invalid provision or application.

12. New Section – Applicability of Other Statutes

It is my intent to specify how this law will be applied with other statutes.

Please include the following language in the P2 draft (page 9, lines 5-8):

(9) APPLICABILITY OF OTHER STATUTORY PROVISION. Notwithstanding any provision of s. 631.01, this section shall apply to an environmental claim regardless of the state in which the general liability insurance policy was issued or delivered.

AN ACT ***to amend*** subchapter III (title) of chapter 632 [precedes 632.22]; and ***to create*** 632.28 of the statutes; **relating to**: environmental claims under general liability insurance policies ~~and granting rule-making authority~~.

Analysis by the Legislative Reference Bureau
This is a preliminary draft. An analysis will be provided in a later version.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

SECTION 1. Subchapter III (title) of chapter 632 [precedes 632.22] of the statutes is amended to read:

CHAPTER 632

SUBCHAPTER III

GENERAL LIABILITY INSURANCE

SECTION 2. 632.28 of the statutes is created to read:

632.28 Environmental claims under liability insurance policies. (1) DEFINITION. In this section, "environmental claim" means a claim for defense or indemnity that is submitted under a general liability insurance policy by an insured and that is based on the insured's liability or potential liability for bodily injury or property damage arising from a release of pollutants onto~~land~~ or into land, air or water, in ~~the~~this state.

"Governmental entity" means any federal, state or local government, or any instrumentality thereof, and any trustee for natural resources.

"Pollutant" means any solid, liquid, gaseous or thermal irritant or contaminant, including but not limited to smoke, vapor, soot, fumes, acids, alkalis, chemicals, asbestos, oil, gasoline, petroleum products, lead or lead based products and waste.

(2) RULES OF CONSTRUCTION OF POLICY UNDER WHICH CLAIM IS MADE. ~~For interpreting a~~The following rules of construction shall apply to the interpretation of general liability insurance ~~policy~~policies under which an environmental claim is made ~~in any action between the insured and the insurer to determine the existence of coverage under the policy for the costs of investigating and remedying environmental contamination, whether in response to governmental demand or under a voluntary written agreement, consent decree, or consent order, including the existence of coverage for the costs of defending a suit against the insured for investigation and remediation costs, the following rules apply:~~

(a) ~~State~~Wisconsin law shall be applied in all cases involving environmental claims. Nothing in this section shall be interpreted to modify common law rules governing choice of law determinations for environmental claims involving bodily injury or property damage arising from a release of pollutants onto or into land, air or water ~~sites located~~ outside this state.

(b) Any action taken by ~~the department of natural resources or the federal environmental protection agency~~any governmental entity against, or any agreement by ~~the department of natural resources or the federal environmental protection agency~~any governmental entity with, an insured in which the governmental entity, in writing, notifies the insured that it considers the insured to be potentially liable for a release of pollutants, or directs, requests, or agrees that the insured take action with respect to ~~contamination~~a release of pollutants onto or into land, air or

water within this state, is equivalent to a suit or lawsuit as those terms are used in the general liability insurance policy.

(c) The insurer may not deny coverage for any reasonable and necessary fees, costs, and expenses, including costs and expenses of remedial investigations and feasibility studies, that are incurred by the insured under a voluntary written agreement, consent decree, or consent order between the insured and ~~the department of natural resources or the federal environmental protection agency~~a governmental entity and as a result of a written direction, request, or agreement by the ~~department of natural resources or the federal environmental protection agency~~governmental entity to take action with respect to ~~contamination~~a release of pollutants onto or into land, air or water within the state, on the ground that those expenses constitute voluntary payments by the insured.

(3) INSURER'S PAYMENT DUTY; INSURED'S NOTICE DUTY. (a) An insurer with a duty to pay defense or indemnity costs, or both, to an insured for an environmental claim under a general liability insurance policy that provides that the insurer has a duty to pay all sums arising out of a risk covered by the policy must pay all defense or indemnity costs, or both,~~proximately~~ arising out of the risk in accordance with the applicable terms of its policy, including its limit of liability, independent of and unaffected by any other insurance that may provide coverage for the same claim.

(b) 1. If an insured who makes an environmental claim under a general liability insurance policy that provides that the insurer has a duty to pay all sums arising out of a risk covered by the policy has more than one such general liability insurance policy insurer, the insured shall provide notice of the claim to every such insurer for whom the insured has a current

address. The insured may designate a single policy period and the insurer or insurers for that policy period, including primary, umbrella and excess insurers, shall fully satisfy the environmental claim up to the policy limits. If the policy limits for all policies for that policy period are insufficient to fully satisfy the environmental claim, the insured may designate additional policy periods until the claim is fully satisfied.

2. If the insured's claim is not fully satisfied under par. (a), the insured may elect to file suit on the remainder of the claim against only one insurer ~~under subd. 1.,~~or against multiple insurers, notwithstanding ss. 803.03 and 806.04-(11).

3. If requested by an insurer against which the insured files suit under subd. 2., the insured shall provide information regarding other general liability insurance policies held by the insured that would potentially provide coverage for the same environmental claim.

4. An insurer against which the insured files suit under subd. 2. may not be required to pay defense or indemnity costs in excess of the applicable policy limits, if any, on such defense or indemnity costs.

(4) COSTS TO BE AWARDED TO INSURED. The court shall award to an insured the sum of the costs, disbursements, and expenses, including accounting fees and reasonable attorney fees, necessary to prepare for and participate in an action in which the insured successfully litigates a coverage issue for an environmental claim. If the environmental claim is not fully satisfied under paragraph (3)(b), any insurer designated by the insured pursuant to paragraph (3)(b) that has not entered into a good faith settlement and release of the environmental claim is directly liable, up to the policy limits, to any governmental entity that seeks to recover against the insured for a release of pollutants onto or into land, air or water in

the state, irrespective of whether the liability is presently established or is contingent and to become fixed or certain by final judgment. Such insurer may be joined in any action brought by a governmental entity against the insured.

(5) CONTRIBUTION AMONG INSURERS. An insurer that ~~pays~~has paid an environmental claim may seek contribution from any other insurer that is liable or potentially liable for ~~the~~that claim, subject to s. 631.43. An insurer that has previously entered into a good faith settlement and release of an environmental claim, shall not be deemed liable or potentially liable for that claim, and a good faith settlement and release of an environmental claim with such insurer shall not reduce or otherwise impair the right of an insured to recover the full balance of its actual loss from a nonsettling insurer, as provided in (3)(a) and (b).

(6) PRESUMPTIONS. (a) There is a rebuttable presumption that the costs of preliminary assessments, remedial investigations, risk assessments, feasibility studies, site investigations or other necessary investigation,~~as those terms are defined by the rule promulgated under par. (c),~~ are defense costs payable by the insurer, subject to the provisions of the general liability insurance policy under which there is coverage for the costs.

(b) There is a rebuttable presumption that the costs of removal ~~action or feasibility studies, as those terms are defined by the rule promulgated under par. (c).~~actions, remedial action or natural resource damages are indemnity costs and that payment of those costs by the insurer reduces the insurer's applicable limit of liability on the insurer's indemnity obligations, subject to the provisions of the general liability insurance policy under which there is coverage for the costs.

~~(c) The department of natural resources shall promulgate a rule defining the terms specified in pars. (a) and (b) for purposes of the rebuttable presumptions under pars. (a) and (b).~~

(7) LOST POLICY. (a) In this subsection, "lost policy" means all or any part of a general liability insurance policy that is subject to an environmental claim and that is ruined, destroyed, misplaced, or otherwise no longer possessed by the insured.

(b) If, after a diligent investigation by an insured of the insured's own records, including computer records and the records of past and present agents of the insured, the insured is unable to reconstruct a lost policy, the insured may provide notice of the lost policy to the insurer that the insured believes issued the policy. The notice must be in writing and in sufficient detail to identify the person or entity claiming coverage, including the name of the alleged policyholder, if known, and any other material facts concerning the lost policy known to the person providing the notice.

(c) An insurer must thoroughly and promptly investigate a notice of a lost policy and must provide to the insured claiming coverage under the lost policy all facts known or discovered during the investigation concerning the issuance and terms of the policy, including copies of documents establishing the issuance and terms of the policy.

(d) For facilitating reconstruction, and determining the terms, of a lost policy, the insurer and the insured must comply with the following minimum standards:

1. Within 30 business days after receipt by the insurer of notice of a lost policy, the insurer shall commence an investigation into the insurer's records, including computer records, to determine whether the insurer issued the lost policy. If the insurer determines that it issued the

policy, the insurer shall commence an investigation into the terms and conditions relevant to any environmental claim made under the policy.

2. The insurer and the insured shall cooperate with each other in determining the terms of a lost policy. The insurer and the insured shall provide to each other the facts known or discovered during an investigation, including the identity of any witnesses with knowledge of facts related to the issuance or existence of the lost policy, and shall provide each other with copies of any documents establishing facts related to the lost policy.

3. If the insurer or insured discovers information tending to show the existence of an insurance policy that applies to the claim, the insurer~~or insured~~ shall provide an accurate copy of the terms of the policy or a reconstruction of the policy, upon the request of the insurer or the insured.

4. If the insurer is not able to locate portions of the policy or determine its terms, conditions, or exclusions, the insurer shall provide copies of all insurance policy forms issued by the insurer during the applicable policy period that potentially apply to the environmental claim. The insurer shall identify which of the potentially applicable forms, if any, is most likely to have been issued by the insurer to the insured, or the insurer shall state why it is unable to identify the forms after a good faith search.

(e) If, based on information discovered in the investigation of a lost policy, the insured can show by a preponderance of the evidence that a general liability insurance policy was issued to the insured by the insurer but cannot produce evidence that tends to show the policy limits applicable to the policy, it shall be assumed that the minimum limits of coverage, including any exclusions to coverage, that the insurer offered during the period in question under such policies

apply to the policy purchased by the insured. If, however, the insured produces evidence that tends to show the policy limits applicable to the policy, the insurer has the burden of proof to show that a different policy limit, including any exclusions to coverage, apply to the policy purchased by the insured.

~~SECTION 3. Initial applicability.~~

~~(1) This act first applies to environmental claims made on the effective date of this subsection.~~

(8) APPLICABILITY AND ENFORCEMENT. (a) This section applies to all environmental claims not finally resolved prior to the effective date of this section either by settlement or adjudication, whether arising before, on or after the effective date of this section.

(b) The commissioner shall enforce this section and any rules adopted by the office of the commissioner of insurance to implement this section.

(c) Violation by an insurer of any provision of this section or any rule adopted under this section is an unfair claim settlement practice under Wisconsin administrative code ch. INS 6.11 (3).

(d) Any person who is injured as a result of violation by an insurer of this section may bring an action against the insurer for costs, disbursements and expenses, including accounting fees and reasonable attorney fees incurred in connection with such violation, including the costs, disbursements and expenses incurred in bringing such action.

(e) The provisions of this section are severable. If any provision of this section is found to be invalid, or if any application of this section either to any person or circumstance is invalid, such invalidity shall not affect other provisions or applications which can be given effect without the invalid provision or application.

(9) APPLICABILITY OF OTHER STATUTORY PROVISION. Notwithstanding any provision of s. 631.01, this section shall apply to an environmental claim regardless of the state in which the general liability insurance policy was issued or delivered.

DEWITT
ROSS & STEVENS S.C.
LAW FIRM

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MEMORANDUM

TO: Interested Persons

FROM: Peter A. Peshek, Esq.

DATE: May 18, 2004

RE: Constitutionality of LRB-4517/P2

The following is an analysis of whether LRB-4517/P2 poses an unconstitutional threat to the insurers' rights to contract.

ISSUE PRESENTED

Whether LRB-4517/P2 would be an unconstitutional impairment of the contract rights of insurers.

SHORT ANSWER

LRB-4517/P2 does not unconstitutionally impair insurers' rights to contract because the proposed legislation merely confirms the rights provided by the plain language of the policy, the pro rata approach urged by insurers is not specified in the policies, the Wisconsin Legislature has specified joint and several liability in analogous circumstances, insurers have no reasonable expectation of avoiding regulation, and the legislation serves a legitimate public interest.

I. THE PROPOSED LEGISLATION MERELY CONFIRMS THE RIGHTS PROVIDED BY THE PLAIN LANGUAGE OF THE POLICY.

The proposed legislation is not an impairment of contract because it does not alter the substantive rights of the parties. Rather, it confirms the rights provided by the plain language of the policies and provides a procedure for enforcing those rights.

The legislation applies to general liability policies under which an insurer promises to pay "all sums" which the insured becomes legally obligated to pay as

damages as a result of property damage due to an occurrence. The legislation spells out a procedure for the insured to avail itself of coverage in cases where there is a single occurrence which spans more than one policy period and where the losses are indivisible, i.e., there is no rational, factual basis to quantify the extent of loss attributable to any one policy period. This is a common situation in environmental claims.

Wisconsin courts have recognized that in the case of long-term environmental claims, there is a single occurrence spanning the time that the damage occurred and that all policies during that time are triggered up to their policy limits. *Society Ins. v. Town of Franklin,* 2000 WI App 35, ¶¶ 9-11, 233 Wis. 2d 207, 215-16, 607 N.W.2d 342; *American Family Mut. Ins. Co. v. American Girl, Inc.*, 2004 WI 2, ¶ 75, 268 Wis. 2d 16, 54-55, 673 N.W.2d 65. In *Society Insurance,* the Court of Appeals affirmed the trial court's ruling that "the limits of liability for each policy triggered are available to the Town for indemnification." 233 Wis. 2d at 213-14, ¶ 7. The Court of Appeals held that "the insured should get the full benefit of the coverage it purchased from the insured." *Id.* at 216, ¶ 11. In such situations, the insurer has paid a premium in return for the insurer's promise to pay "all sums" the insured becomes legally obligated to pay up to the policy limits. The insurer cannot renege on part of its "all sums" promise because the occurrence extends into other policy periods. Rather, all of the insurers owe the same obligation to the insured up to their policy limits, not to exceed the insured's total loss. The insurers may then equitably settle accounts among themselves.

This "all sums" approach has already been confirmed in appellate court decisions in eight states. In addition, Oregon has codified elements of an "all sums" approach by legislation. The Oregon equivalent of the legislative counsel was asked whether the Oregon legislation impairs contract rights of the insurers and provided the following answer:

> Q: Does SB 297 impermissibly change existing contracts?
>
> A: No. SB 297 merely clarifies the meaning of the term "all sums."
>
> The typical standard form printed comprehensive general liability policy reads that
>
> "The Company will pay on behalf of the insured *all sums* which the insured shall become legally obligated to pay as damages because of...property damage...to which this insurance applies, caused by an occurrence."

> There is no definition in the typical standard form policy of the term "all sums." The bill thus clarifies what "all sums" means. It does not change or modify the agreement by using a different term or allocation approach. Thus it is not a change only a clarification.

The same principle applies with respect to the proposed legislation in Wisconsin. It does not impair contract rights because it merely confirms the rights already provided by the contract and establishes an efficient remedy to enforce those rights.

II. THE PRO RATA APPROACH URGED BY INSURERS IS NOT SPECIFIED IN THE POLICIES.

The insurance industry typically argues for a "pro rata" approach whereby they contend that the total loss from a long-term occurrence should be divided among the multiple insurance policies triggered either by a strict mathematical division according to the number of years, or by a weighted division according to the relative policy limits. Under the insurers' suggested approach, the coverage provided to the insured by each policy is reduced to the pro rata amount.

However, there is no provision in the typical general liability policy that specifies such an approach or authorizes the insurer to so reduce its available coverage. The policies, which are drafted by the insurers and expressly contemplate coverage for continuous occurrences, contain no provision allowing reduction of the insurer's obligation where an occurrence spans more than one policy period. In fact, a committee of insurance representatives charged with drafting the standard-form liability policies considered and rejected incorporating express proration into such general liability policies:

> [T]he committee of insurance representatives charged with revising the standard-form CGL policies considered adopting the pro rata formula set in *Forty-Eight Insulations.* However, citing concerns that proration language 'might have some impact on pricing of insurance and the excess insurance marketplace,' the pro rata formula of *Forty-Eight Insulations* was never incorporated into any CGL policy.

Garrett G. Gillespie, *The Allocation of Coverage Responsibility Among Multiple Triggered General Liability Policies in Environmental Cases: Life After Owens-Illinois,* 15 Va. Envtl. L.J. 525, 570 (1996).

Thus, a majority of courts that have considered the issue have held that in continuous injury cases, once a liability policy that was in effect for any part of

the injury period is triggered, the insurer is liable for the full amount of damage up to the policy limits. *See Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co.*, 769 N.E.2d 835, 841 (Ohio 2002) (noting that the national majority rule forbids insurers from limiting their liability to a pro rata share unless the policy expressly allows it). While the insurer may obtain contribution from other insurers that also had policies in effect during the occurrence period, the insurer has the responsibility to seek contribution from other insurers after the policyholder is made whole.

In *Keene Corp. v. Insurance Co. of North America*, 667 F.2d 1034 (D.C. Cir. 1981) cert. denied 455 U.S. 1007 (1982), a case involving asbestos-related disease, the D.C. Circuit held that "once an insurer's coverage is triggered, the insurer is liable to [the insured] to the full extent of [the insured's] liability up to its policy's limits." *Id.* at 1048. The insurer may then seek contribution from other insurers. *Id.* at 1050. The court pointed out that "[t]here is nothing in the policies that provides for a reduction of the insurer's liability if an injury occurs only in part during a policy period." *Id.* at 1048. Other courts have followed similar principles. *Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co.*, 769 N.E.2d 835, 841 (Ohio 2002); *Armstrong World Indus. v. Aetna Cas. & Sur. Co.*, 45 Cal. Rptr. 2d 690, 706-07 (Cal. Ct. App. 1996); *Monsanto Co. v. C.E. Heath Comp. & Liab. Ins. Co.*, 652 A.2d 30, 34 (Del. 1994) (applying Missouri law); *Hercules, Inc. v. AIU Ins. Co.*, 784 A.2d 481, 489-93 (Del. 2001) (applying Delaware law); *Zurich Ins. Co. v. Raymark Indus., Inc.*, 514 N.E.2d 150, 165 (Ill. 1987); *Rubenstein v. Royal Ins. Co. of Am.*, 694 N.E.2d 381, 388 (Mass. App. Ct. 1998); *Allstate Ins. Co. v. Dana Corp.*, 759 N.E.2d 1049, 1057-58 (Ind. 2001); *J.H. France Refractories Co. v. Allstate Ins. Co.*, 626 A.2d 502, 507-08 (Pa. 1993); *American Nat'l Fire Ins. Co. v. B & L Trucking & Constr. Co.*, 951 P.2d 250, 254-56 (Wash. 1998); *Texas Prop. & Cas. Ins. Guar. Ass'n v. Southwest Aggregates, Inc.*, 982 S.W.2d 600, 605 (Tex. Ct. App. 1998).

The Supreme Court of Delaware pointed out that "insurance companies may effectively limit their coverage obligations with an explicit pro rata provision in the terms of the policy," and in fact have done so in some policies. *Monsanta Co. v. C.E. Heath Comp. & Liab.*, 652 A.2d at 34. But, where "a policy is *silent* on proration, the insurance company is jointly and severally liable to the full extent of the policyholder's loss." *Id.* (emphasis in original). "If the insurer wished to limit its liability through a pro rata allocation of damages once a policy is triggered, the insurer could have included that language in the policy." *American Nat'l Fire Ins. Co. v. B & L Trucking and Constr. Co.*, 951 P.2d at 256. "[A]n insurer's duty to indemnify its insured is not reduced when there is

concurrent coverage among consecutive insurers, because there is nothing in the policies that provides for a reduction of the insurer's liability if an injury occurs only in part during a policy period." *Texas Prop. & Cas. Ins. Guar. Ass'n v. Southeast Aggregates, Inc.*, 982 S.W.2d at 605.

In a case where the policy defined an "occurrence" to include "continuous or repeated exposure" to conditions which result in damage, *J.H. France Refractories v. Allstate Ins. Co.*, 626 A.2d at 508, the Pennsylvania Supreme Court observed:

> Being defined as one 'occurrence,' the entire injury, and all damages resulting therefrom, fall within the indemnification obligation of the insurer. In other words, once the liability of a given insurer is triggered, it is irrelevant that additional exposure or injury occurred at times other than when the insurer was on the risk. The insurer in question must bear potential liability for the entire claim.

Thus, the pro rata approach urged by insurers is not specified by the policy.[1] Rather, it is based upon "public policy and equitable considerations." *Olin Corp. v. Insurance Co. of N. Am.*, 221 F.3d 307, 324 (2nd Cir. 2000) (a leading "pro rata" case decided under New York law). However, deciding "public policy" falls squarely within the province of the Legislature and it has already exercised that authority on analogous issues.

III. THE WISCONSIN LEGISLATURE HAS SPECIFIED JOINT AND SEVERAL LIABILITY OF INSURERS IN ANALOGOUS CIRCUMSTANCES.

The Wisconsin Legislature has specified joint and several liability of insurers by statute in analogous situations to assure fair treatment of insureds. Wis. Stat. § 631.43. That statute deals with "other insurance" provisions in insurance policies indemnifying the insured against the same loss. It covers situations where two or more insurance policies during the same policy period provide coverage for the same loss. The insurance policies typically contain "other insurance" provisions which attempt to specify the relative obligations of each insurer for the loss. The statute provides that the insurers cannot reduce the

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[1] As explained, the "all sums" approach is compelled by the plain language of the policies. However, even if there were some arguable ambiguity, the result would be the same because any ambiguity must be construed in favor of coverage. *Danbeck v. American Family Mut. Ins. Co.*, 2001 WI 91, ¶ 10, 245 Wis. 2d 186, 193, 629 N.W.2d 150, 154.

total insurance coverage available to the insured through such clauses. It also specifies that where the "other insurance" provisions are inconsistent, "the insurers shall be jointly and severally liable to the insured, . . . each to the full amount of coverage it provided." § 631.43(1). The purpose of that provision is explained in the legislative history:

> The most important objective of the law is to give the insured full protection with minimum difficulty and joint and several liability does that. The insurers may then settle accounts among themselves. They will usually be able to do so by agreement. If they cannot, a court can do so first by interpreting the terms of the policies and, where they are inconsistent, applying restitutionary principals. In the past "other insurance" clauses have often done injustice; that fact was the reason for the enactment of statutes like s. 203.11. Courts have dealt with these problems with reasonably good results even in the absence of such a provision, and there is no reason to doubt that they can do justice as between the insurers, once the insured has received full indemnity.

1975 Wis. Laws 375, note to § 631.43.

The problem addressed by the subject portion of § 631.43 is analogous to the problem to be addressed by the proposed legislation. In each case, the rights of insurers among themselves are not clearly and effectively spelled out and, as a result, the insured is threatened with delays, costs and becoming embroiled in a dispute between insurers. To remedy such an abuse, all insurers are jointly and severally liable to the insured. The insured is thus taken out of the middle and the insurers are left to resolve the dispute among themselves.

There is another facet of abuse which is also addressed by the proposed legislation. The insurance industry typically contends that the responsibility of each insurer should be reduced pro rata not only by virtue of other years of the occurrence in which there was insurance for the loss, but also by shifting a portion of the loss directly to the insured itself for years in which the insured's policies excluded the particular loss. Such a result is part of the insurance industry's view of "equity." However, Wisconsin courts long ago declared attempts by insurers to shift covered losses back onto their own insured to be inequitable and have refused to enforce such attempts as a matter of public policy. *First Nat'l Bank of Columbus v. Hansen,* 84 Wis. 2d 422, 431-32, 267 N.W.2d 367 (1978); *Hallmark Ins. Co. v. Crary Enters., Inc.*, 72 Wis. 2d 472, 476, 241 N.W.2d 171 (1976); *Miller v. Kujak*, 4 Wis. 2d 80, 90 N.W.2d 137 (1958). The proposed legislation adopts an approach consistent with the Wisconsin Supreme Court's view of equity rather than that of the insurance industry.

IV. INSURERS HAVE NO REASONABLE EXPECTATION OF AVOIDING REGULATION.

An independent reason why the proposed legislation would not impair contract rights is that the insurance industry is heavily regulated and has no reasonable expectation that regulations will not be changed over time. The United States Supreme Court has explained that members of heavily regulated industries have no reasonable expectation that all regulation will remain static and, therefore, have rejected claims from such parties that legislation unconstitutionally impairs their contract rights. *Veix v. Sixth Ward Bldg. & Loan Ass'n,* 310 U.S. 32, 38 (1940). This principle has been followed by Wisconsin courts. *See Pfister v. Milwaukee Econ. Dev. Corp.*, 216 Wis. 2d 243, 271, 576 N.W.2d 554 (Ct. App. 1998). It has been followed expressly in the context of rejecting claims by insurers that regulations impaired contract rights in other jurisdictions. *See Honeywell, Inc. v. Minnesota Life & Health Ins. Guar. Ass'n.*, 110 F.3d 547, 555 (8th Cir. 1997), cert. denied 552 U.S. 858 (1997). For that reason alone, the proposed legislation would not unconstitutionally impair contract rights.

V. THE LEGISLATION WOULD NOT BE UNCONSTITUTIONAL BECAUSE IT IS A VALID EXERCISE OF POLICE POWER TO SERVE LARGER PUBLIC INTERESTS.

Finally, the contract clause is not absolute. Even in a circumstance where (unlike here) substantive contract rights are impaired, the legislation will not be held unconstitutional where it serves valid and significant public purposes. *State ex rel. Cannon v. Moran*, 111 Wis. 2d 544, 559-60, 331 N.W.2d 369 (1983); *Wipperfurth v. U-Haul Co. of W. Wis.*, 101 Wis. 2d 586, 592-94, 304 N.W.2d 767 (1981). The contract clause does not deprive the State of its right and duty to promote public health and welfare:

> First of all, it is to be accepted as a commonplace that the Contract Clause does not operate to obliterate the police power of the States. "It is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the State from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected. This power, which in its various ramifications is known as the police power, is an exercise of the sovereign right of the Government to protect the lives, health, morals, comfort and general welfare of the people, and is paramount to any rights under contracts between individuals."

Wipperfurth, 101 Wis. 2d at 593-94 (quoting *Allied Structural Steel Co. v. Spannaus,* 438 U.S. 234, 241, (1978) (internal citation omitted)).

It is uniquely within the province of the legislature, rather than the courts, to divine issues of public policy and regulate accordingly. This is especially true when economic and social concerns support regulation:

> As is customary in reviewing economic and social regulation, ... courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure.

Energy Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400, 412-13 (1983) (internal citations omitted).

Public policies that may justify an impairment of contract rights vary widely and include avoiding the burdens of litigation. *Matthies v. Positive Safety Mfg. Co.*, 2001 WI 82, ¶ 37, 244 Wis. 2d 720, 751, 628 N.W.2d 842. In this case, the proposed legislation would serve many important public policies, including the following:

- Wisconsin's strong governmental concern with protecting the environment and cleaning up pollution (*see* Wis. Stat. § 281.11);
- Wisconsin's longstanding policy of assuring fair treatment of policyholders by preventing insurers from reducing the insurance coverage they sold to their policyholders after the fact because of other insurers that insure the same risk (*see* Wis. Stat. § 631.43);
- Certainty and predictability of results by clarifying the procedure for payment of environmental claims (*see generally Association of Career Employees v. Klauser*, 195 Wis. 2d 602, 617, 536 N.W.2d 478 (Ct. App. 1995);
- Minimizing incentives for delay and costly, unnecessary litigation clogging Wisconsin's courts (*see Matthies,* 244 Wis. 2d at 751);
- Wisconsin's legitimate and demonstrated interest in regulating the insurance industry (*see* Wis. Stat. § 631.43);

- Easing the economic burdens of its own residents (*Honeywell,* 110 F.3d at 555); and

- Protecting the future financial stability of individuals (*Honeywell,* 110 F.3d at 555).

In short, retroactive economic legislation which is reasonably related to a legitimate governmental purpose will be upheld even when contract rights are impaired:

> It is by now well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, ... the modern framework for substantive due process analysis concerning economic legislation requires only an inquiry into whether the legislation is reasonably related to a legitimate governmental purpose. ... Retroactive economic legislation has been upheld as reasonable even in circumstances where it destroys a settled expectancy or imposes a new liability.

(Honeywell, 110 F.3d at 554-55 (citing *Usery v. Turner Elkhorn Mining Co.,* 428 U.S. 1, 15 (1976) and others) (internal citations omitted).

Accordingly, because of the important public policies served by the legislation, the statute would be constitutional regardless of whether it were deemed to cause some impairment to contracts.

for the drafting file

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